No. 00-1741

Supreme Court, U.S.
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In The

Supreme Court of the United States

COMMUNITIES FOR A GREAT NORTHWEST and NORTHWEST MINING ASSOCIATION,

Petitioners,

v.

ED ARGENBRIGHT, COMMISSIONER OF POLITICAL PRACTICES of the State of Montana, and MIKE COONEY, SECRETARY OF STATE of the State of Montana,

Respondents,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, and CITIZENS FOR I-125,

Respondents-Intervenors.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the district court properly exercised its discretion in determining not to invalidate a state court election.

TABLE OF CONTENTS

Page

Issue Presented i

Table of Authorities iii

Statement of the Case 1

Reasons For Denying the Writ 5

I. Federal Courts Should Invalidate State Court Elections Only When Serious Voting Violations or Aggravating Factors Have Been Demonstrated 5

A. Petitioners Failed to Demonstrate the Type of Serious Constitutional Violation That Warrants a Federal Court's Invalidation of an Otherwise Lawful State Election 5

B. The Ninth Circuit Properly Considered the Entire Record of Proceedings in Affirming the Decision of the District Court Not to Invalidate the Election on I-137 9

II. Petitioners' Assertion That the Decision of the Ninth Circuit to Refuse to Invalidate the Results of the Election Creates a Conflict With the Decisions of Courts in Other Circuits Is Illusory ... 11

A. Federal District Courts Enjoy Broad Discretion in Fashioning Equitable Relief 11

B. The District Court Properly Exercised Its Discretion in Determining *Not* to Invalidate the Election on I-137 15

Conclusion 17

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999) 16

FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) 1

Lemon v. Kurtzman, 411 U.S. 192 (1973) 16

FEDERAL CIRCUIT COURT CASES

Bell v. Southwest, 376 F.2d 659 (5th Cir. 1967) 6

Bennett v. Yoshina, 140 F.3d 1218 (9th Cir. 1998) 6

Cook v. Luckett, 735 F.2d 912 (5th Cir. 1984) 6

Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981) 6

Gjerten v. Board of Election Commissioners for City of Chicago, 791 F.2d 472 (7th Cir. 1986) 15, 16

Gold v. Feinberg, 101 F.3d 801 (2d Cir. 1996) 12

Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) .. 6, 12, 16

McMichael v. County of Napa, 709 F.2d 1268 (9th Cir. 1983) 12, 13

Michigan Chamber of Commerce v. Austin, 788 F.2d 1178 (6th Cir. 1986) 10

Montana Chamber of Commerce v. Argenbright, 226 F.3d 1049 (9th Cir. 2000) 5, 7

Smith v. Cherry, 498 F.2d 1098 (7th Cir. 1973) 13, 14

Soules v. Kauaians for Nukolii Campaign Comm., 849 F.2d 1176 (9th Cir. 1987) 5, 7, 9

State of Florida v. Charley Toppino & Sons, Inc., 514 F.2d 700 (5th Cir. 1975) 4

TABLE OF AUTHORITIES – Continued

Page

FEDERAL DISTRICT COURT CASES

Americans for Medical Rights v. Heller, 2 F. Supp. 2d 1307 (D. Nev. 1998) 10

Montana Chamber of Commerce v. Argenbright, CV 97-66-H-CCL 3, 4

Montana Mining Ass'n v. Argenbright, CV 98-37-H-CCL 3, 4

Montana Mining Ass'n v. Simonich, CV 98-48-H-CCL 4, 9

CONSTITUTIONAL PROVISIONS

U.S. Constitution, First Amendment 3

STATUTES AND RULES

Fed. R. Civ. P. 52(a) 9, 10

Fed. R. Evid. 201(b)(2) 4

Mont. Code Ann. § 13-35-227 ..... 1, 2, 5

Mont. Code Ann. § 82-4-390 2

STATEMENT OF THE CASE

Petitioners suggest that the State of Montana "coercively and selectively suppressed virtually all opposition" to the passage of Initiative 137 (I-137) and thereby "dictated which view of the initiative the electorate was permitted to hear." Pet. at 2. This statement is wrong as a matter of law and fact. The subject of Petitioners' ire, Initiative 125 (I-125), codified at Mont. Code Ann. § 13-35-227, admittedly prohibited direct corporate spending in connection with ballot issues. The law left open multiple avenues of corporate speech, however, and it certainly did not dictate which view of a particular ballot issue that the Montana electorate was permitted to hear.

Montana voters approved I-125 at the general election in November 1996. I-125 permitted corporations to establish and administer separate, segregated funds from which contributions to and expenditures in support of ballot issues could be made. Mont. Code Ann. § 13-35-227(3). Contributions to these segregated funds could come from many sources, including corporate shareholders, corporate employees, or other members and officers of the corporation. *Id.* I-125 prohibited only contributions that come directly from the corporate treasury. *Id.*

I-125 further provided that these restrictions did not apply to certain non-profit corporations formed for the purpose of promoting political ideas. Mont. Code Ann. § 13-35-227(4). This exception, designed to conform with this Court's holding in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), covered corporations that do not

engage in business activity, corporations whose shareholders have no private claim on the corporate assets, corporations which do not have for-profit corporations as members, and corporations which do not receive in the aggregate more than five percent of their annual total revenues from for-profit corporations. Mont. Code Ann. § 13-35-227(4).

I-137 qualified for the 1998 Montana general election ballot on July 16, 1998. I-137 sought to prohibit new cyanide heap and vat leach open-pit gold and silver mines in Montana. A majority of 53 percent of Montana voters in the November 1998 general election approved I-137. I-137 is now codified at Mont. Code Ann. § 82-4-390.

Petitioners fail to disclose that numerous corporations took advantage of the segregated fund option available under Mont. Code Ann. § 13-35-227(3) to raise significant amounts of money in 1998 in support of, or opposition to numerous ballot issues. For example, the Montana Education Association (MEA) established a segregated fund in 1998 that donated more than $30,000 to various ballot issues. App. 50-52. I-125 had negligible effect on the political spending of the MEA during the 1998 general election campaign. The $32,000 spent by the MEA on ballot issues during the general election campaign in 1998, under the dictates of I-125, represented more than the MEA had spent on ballot issues in all but one campaign between 1990 and 1996. *Id.* at 56-57.

Similarly, the Montana Mining Association (MMA) spent $10,140 in opposition to a water quality initiative in the 1996 election, before the enactment of I-125. App. 34.

The MMA considered the defeat of this water quality initiative to be very important to its members. *Id.* at 33. By comparison, in 1998, the MMA's segregated ballot fund had raised more than $10,000 to be used to oppose I-137 by the time of the trial on I-125 in October 1998. *Id.* at 27, 30, 36-37.

On February 14, 1997, opponents of I-125 filed a complaint in federal district court in *Montana Chamber of Commerce v. Argenbright*, CV 97-66-H-CCL ("*Chamber*"), the Honorable Charles C. Lovell presiding. The complaint in the *Chamber* case sought a declaratory judgment that I-125 violated the First Amendment rights of corporations and these opponents also sought a permanent injunction against its enforcement. The district court set the *Chamber* case for trial for May 18, 1998. Upon joint stipulation and motion of the parties, however, the district court vacated the trial date and set a new trial date for October 13, 1998. As indicated by the district court, but for the parties' request, the district court would have heard and decided the *Chamber* case in the spring of 1998, well in advance of the 1998 general election.

A different group, including Petitioners, seeking largely the same relief, filed a separate action in federal district court, also to be heard by Judge Lovell, on September 1, 1998. See *Montana Mining Ass'n v. Argenbright, et al.*, CV 98-37-H-CCL ("*MMA*"). The complaint in the *MMA* case also sought to enjoin the election on I-137, set for November 3, 1998, a mere eight weeks away. Petitioners waited more than three months after the Montana Secretary of State approved the form of the proposed I-137 on May 18, 1998, a fact widely reported in the Montana press, before filing their complaint, as noted by

the district court in *Montana Mining Ass'n v. Simonich*, CV 98-48-H-CCL. App. 14.[1] In *Simonich*, Judge Lovell denied the request filed by Montana Mining Association and two other mining companies for a preliminary injunction on I-137. *Id.* at 15.

On May 24, 1998, the Commissioner of Political Practices for the State of Montana issued an opinion related to an inquiry from Seven-Up Pete Joint Venture, the developers of a proposed open-pit gold mine. *Id.* at 9. The Commissioner's opinion found that I-125 did not apply to the Seven-Up Pete Joint Venture, a partnership comprised of several corporations, in relation to its planned campaign to oppose I-137. *Id.* The Montana Secretary of State certified on July 16, 1998, that the requisite number of signatures had been gathered to place I-137 on the general election ballot. *Id.* The Petitioners did not challenge the proposed initiative at that time, however, and instead, waited another six weeks to file their complaint. *Id.* at 13-14.

The district court consolidated the *Chamber* and the *MMA* cases and by agreement of all the parties, set the cases for trial between October 13 and 22, 1998, only six weeks after Petitioners filed their action. At the end of the trial, on October 22, 1998, the district court ruled that

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[1] Although the district court's Order in *Simonich* is not part of the record in this case, it certainly is related to this case and involves parties, including the Montana Mining Association, that were involved in this same action. Moreover, Fed. R. Evid. 201(b)(2), permits this Court to take judicial notice of a decision of a federal district court. *State of Florida v. Charley Toppino & Sons, Inc.*, 514 F.2d 700, 704 (5th Cir. 1975).

I-125 was unconstitutional, but the district court refused to enjoin the scheduled election on I-137. The timing of the district court's decision left Petitioners eleven days in which to spend unrestricted amounts of money in opposition to I-137. The Ninth Circuit affirmed the district court on both issues. *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000).

REASONS FOR DENYING THE WRIT

I. Federal Courts Should Invalidate State Court Elections Only When Serious Voting Violations or Aggravating Factors Have Been Demonstrated.

Petitioners seek to have this Court invalidate an otherwise lawful state election. Petitioners do not allege any voting irregularities, any disenfranchisement of voters, any miscounted ballots or improperly cast ballots. Petitioners' entire claim for invalidating the otherwise lawful state election rests on the sole allegation that a Montana statute, Mont. Code Ann. § 13-35-227, prevented them from spending as much money as they would have liked to oppose I-137.

A. Petitioners Failed to Demonstrate the Type of Serious Constitutional Violation That Warrants a Federal Court's Invalidation of an Otherwise Lawful State Election.

As a general rule, a federal court's decision to set aside or invalidate a state election is a "drastic if not staggering remedy" that should be reserved for the most egregious cases of constitutional violations. *Soules v.*

Kauaians for Nukolii Campaign Comm., 849 F.2d 1176, 1180 (9th Cir. 1987), *quoting Bell v. Southwest*, 376 F.2d 659, 662 (5th Cir. 1967). The type of constitutional violations that have been found to justify a federal court's decision to set aside a state election are limited to "serious voting violations or aggravating factors, such as racial discrimination or fraudulent conduct." *Cook v. Luckett*, 735 F.2d 912, 922 (5th Cir. 1984).

The Ninth Circuit has noted that federal courts should *not* invalidate state elections on substantive due process grounds absent a finding that voters relied on an established election procedure *and* a finding that significant voter disenfranchisement resulted from the state's unexpected departure from the established election procedure. *Bennett v. Yoshina*, 140 F.3d 1218, 1226-27 (9th Cir. 1998); *see also Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. 1981) (holding that entire electorate was disenfranchised when state officials refused to hold a special election, as required under state law, to fill a vacant seat on the state supreme court); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (finding that "outrageous racial discrimination" requires invalidating a state election "simply for its lack of integrity").

Petitioners in this case surely can make no argument that any voters in Montana were disenfranchised at the election on I-137. More than 325,000 voters in Montana cast ballots on the I-137 initiative. Pet. at 6 n.3. Petitioners make no allegation that any potential voters were kept from the polls. Similarly, Petitioners make no allegation that election officials in Montana improperly counted ballots, improperly counted invalid ballots, or otherwise

departed from established and normal election procedures in Montana. Petitioners are left to argue, in effect, that the district court should have invalidated the election on I-137 because the Petitioners were not able to spend as much money in opposition to I-137 as they would have liked. Such a claim has never moved a federal court to invoke the "staggering remedy" of invalidating an otherwise lawful state election. *Soules*, 849 F.2d at 1180.

Even this last argument is found wanting, however, when examined in light of the record. As affirmed by the Ninth Circuit, the Petitioners, and groups related to them, spent the same amount in opposition to I-137 in the 1998 general election as they had spent in their successful opposition to I-122, an initiative in the 1996 general election that would have restricted the ability of mining companies to discharge pollutants into Montana's waterways. *Argenbright*, 226 F.3d at 1053-54. This fact belies the Petitioners' claim that the State of Montana "had completely 'deprive[d]' the [Petitioners] of the ability 'to communicate their political views' and 'political ideas' to the electorate." Pet. at 10.

Moreover, Petitioners' claim that I-125 prevented them entirely from campaigning against I-137 lacks further credibility when considered in light of the efforts made, or more precisely *not* made, by Petitioners to campaign against I-137. For example, Petitioners' representatives at trial, testified that Petitioners had taken no steps to determine what political activities were permitted under I-125 at the time of the election campaign on I-137. App. 19-25, 27-37, 40-47. In fact, Petitioners had not established a segregated fund, permitted under Montana law,

to oppose I-137. *Id.* at 21, 24. Further, Petitioners took no steps to solicit their members for individual contributions to the campaign against I-137. *Id.* at 29. And most surprisingly, Petitioners failed even to inform their members of the existence of I-137 on the 1998 general election ballot in Montana and its possible ramifications in their newsletter, surely an action permitted under I-137. *Id.* at 20, 28.

Similarly, the testimony at trial demonstrated that individual corporate members of the Montana Mining Association had made no efforts to participate in the campaign against I-137. These corporate members of the Montana Mining Association admitted on cross-examination that they failed to establish a segregated fund to oppose I-137 and that they did not try to solicit individual contributions in opposition to I-137. These members justified their inaction on their fears of violating the dictates of I-125. App. 19-25, 40-47. These same members conceded, however, that they took no steps, such as contacting the office of the Commissioner of Political Practices for the State of Montana, to determine what activities would have been permitted under I-125. *Id.*

Other corporations affected by I-137 suffered from similar failures. As noted by Mike Cooney, then Secretary of State for the State of Montana, based on his experience as the chief elections officer for the State of Montana and his own state-wide campaigns, the opponents of I-137, including Petitioners, made a concerted effort *not* to participate in the campaign against I-137 in order to influence the district court regarding the alleged onerousness of the restrictions imposed on corporations by I-125. App. 61-62. Thus, the "gag rule" repeatedly referenced in the

Petition seems more to have been self-imposed by Petitioners than to have been dictated by the restrictions of I-125. *See Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988) (noting that a party challenging the validity of an election should not be permitted to engage in "sandbagging" tactics to improve its chances in court).

B. The Ninth Circuit Properly Considered the Entire Record of Proceedings in Affirming the Decision of the District Court Not to Invalidate the Election on I-137.

Despite this evidence in the record, Petitioners repeatedly chastise the Ninth Circuit, and Judge Rymer, the author of the majority opinion, in particular, for allegedly making up out of whole cloth findings regarding Petitioners' ability to campaign against I-125. In fact, Petitioners argue that Judge Rymer violated Rule 52(a) of the Federal Rules of Civil Procedure by her alleged failure to find that I-125 prohibited Petitioners entirely from campaigning against I-137. Pet. at 21.

The district court's account of the evidence with regard to Petitioners' ability to campaign against I-137 admittedly was succinct.[2] Nevertheless, the Ninth Circuit

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[2] It should be noted that Petitioners were fully aware of the related proceedings in *Simonich, supra*, in which Judge Lovell denied the motion for a preliminary injunction to prohibit enforcement of I-137 filed by the Montana Mining Association and other mining companies. Judge Lovell's order runs to 22 pages and lays out in great detail his reasons for denying the motion for a preliminary injunction and their factual underpinnings.

had before it the entire record in this case, including the transcripts of testimony by representatives of the Petitioners regarding the Petitioners' complete failure to take advantage of avenues of speech available to them under I-125 and Petitioners' delay in seeking to halt the election on I-137. Petitioners could have challenged I-137 even before July 16, 1998, when it qualified for the Montana general election campaign. *See Michigan Chamber of Commerce v. Austin*, 788 F.2d 1178, 1183 (6th Cir. 1986) (holding that a challenge to a proposed campaign finance initiative ripened even before the proposed initiative had qualified for the ballot in order to allow sufficient time for judicial review); *Americans for Medical Rights v. Heller*, 2 F. Supp. 2d 1307, 1313 (D. Nev. 1998) (holding that plaintiffs have standing to challenge a proposed ballot initiative even before the initiative qualifies for the ballot due to imminent injury during the petition-gathering process).

The district court rushed this matter to trial a mere six weeks after the filing of Petitioners' complaint in order to resolve the issues in advance of the election on I-137. Petitioners argue that the eleven days between the district court's decision to invalidate I-125 and the election on I-137 did not afford them sufficient time to "educate" the electorate in Montana. As seen from the record in this matter, however, the choice of when to file the complaint and when to resolve the controversy surrounding their ability to oppose I-137 was largely their own doing. The Ninth Circuit properly reviewed this record and affirmed the decision by the district court not to invalidate the election on I-137. Nothing in Rule 52(a) of the Federal Rules of Civil Procedure prohibited the Ninth

Circuit from undertaking such a review and affirming the decision of a district court not to invalidate a state election.

II. Petitioners' Assertion That the Decision of the Ninth Circuit to Refuse to Invalidate the Results of the Election Creates a Conflict With the Decisions of Courts in Other Circuits Is Illusory.

Petitioners suggest that the decision of the Ninth Circuit in this case creates conflicts with the decisions of courts of appeal on two separate issues. First, Petitioners argue that the Ninth Circuit's decision to affirm the district court's refusal to invalidate the election on I-137 despite the district court's finding that I-125 prevented Petitioners from campaigning fully against I-137 allegedly conflicts with decisions from other courts of appeal that require a district court to invalidate a state election whenever it finds a constitutional violation. Pet. at 24-27. Petitioners argue that further conflict arises from the Ninth Circuit's decision not to reverse the district court for its alleged failure to analyze whether invalidating the I-137 election was a proper remedy. Pet. at 26 n.7. Both alleged conflicts prove to be illusory.

A. Federal District Courts Enjoy Broad Discretion in Fashioning Equitable Relief.

Petitioners posit the unremarkable claim that courts in the Ninth Circuit, along with other federal courts, have discretion to invalidate state elections in certain instances. Pet. at 24, 25. In making this point, Petitioners rely upon decisions from no fewer than seven separate

courts supporting the notion that federal courts have discretion to invalidate state elections when "the election process itself reaches the point of patent and fundamental unfairness." *Gold v. Feinberg*, 101 F.3d 801 (2d Cir. 1996). The federal court's discretion is not in doubt.

To further bolster this point, Petitioners quote extensively from a concurring opinion written by Justice Kennedy when he sat on the Ninth Circuit. Pet. at 25. As quoted by Petitioners, Justice Kennedy conceded that federal courts could invalidate state court elections in certain cases:

> Federal courts will enter orders to invalidate state election results where voters have suffered an unconstitutional deprivation of the opportunity to vote even when it is not clear that the outcome would have been affected, but such relief has been reserved for instances of willful or severe violations of established constitutional norms.

Pet. at 25; *quoting McMichael v. County of Napa*, 709 F.2d 1268, 1273 (9th Cir. 1983) (Kennedy, J., concurring), *citing Griffen v. Burns*, 570 F.2d 1065, 1080 (1st Cir. 1978). Petitioners in this case cannot contend seriously that anyone, least of all the corporations that they represent, "suffered an unconstitutional deprivation of the opportunity to vote" on I-137. Petitioners can argue only that the corporations were hindered in their ability to spend as much money as they would have liked in opposition to I-137.

Moreover, Petitioners fail to inform the Court of the next sentence in Justice Kennedy's concurring opinion in which he concludes that the "present case is not in that category." *McMichael*, 709 F.2d at 1273-74 (Kennedy, J.,

concurring). Petitioners further fail to disclose that the dicta quoted from Justice Kennedy's concurring opinion arose in a case in which the Ninth Circuit dismissed a challenge to a county-wide vote on a referendum issue for lack of standing. In fact, Justice Kennedy concurred separately to offer his view that the majority gave too much credence to the claim by even engaging in the standing analysis. He argued instead that the action "should be dismissed because it fails to state a claim upon which the relief sought can be granted." *Id.* at 1273 (Kennedy, J., concurring). The relief sought in *McMichael*, invalidation of an election, is the same relief sought by Petitioners in this case.

Petitioners move from the unremarkable proposition that federal courts may invalidate state elections in certain instances to the wholly remarkable claim that federal district courts lack discretion *not* to invalidate a state election if the federal court finds irregularities with the election process. Pet. at 25. Petitioners can cite only one case, however, in which a federal court allegedly has held that a district court lacks discretion *not* to invalidate a state election upon a finding by the federal court that certain irregularities plagued the state election. *See* Pet. at 25, *citing Smith v. Cherry*, 498 F.2d 1098, 1113 (7th Cir. 1973 (per curiam)).

In this nearly thirty-year-old case, the Seventh Circuit, in a per curiam opinion, reversed an order by a federal district court dismissing an action for failure to state a claim upon which relief could be granted. The plaintiffs alleged a fraudulent scheme by which a group of Democratic party officials conspired to defeat a candidate by having a sham, or stand-in, candidate run against

the candidate in a Democratic primary. The district court dismissed the complaint on the ground that no impermissible discrimination had been shown. *Smith*, 498 F.2d at 1100. The Seventh Circuit reversed and remanded the cause for further proceedings.

The majority of the opinion discussed the abstention doctrine and whether it applied with regard to a federal court's review of a state election. The court also provided guidance on the sufficiency of the complaint. The court recognized that the complaint, as drafted, alleged sufficient violations of federal law upon which relief could be granted. The court acknowledged, however, that due to the incomplete state of the record in the case "it is impossible to determine the merits of this controversy." *Smith*, 498 F.2d at 1103.

In providing guidance to the district court remand, the court made the following suggestion:

> If the plaintiffs prove an agreement that Cherry would be a stand-in candidate, and show a reasonable possibility that Cherry's sham candidacy affected the outcome of the election, then the district court *should* order new primary and general elections.

Id. (emphasis added). This conditional statement hardly smacks of a conflict of the degree calling for this Court's attention. The Seventh Circuit merely states that (1) if the plaintiffs prove an agreement regarding a stand-in candidate, and (2) if the plaintiffs show a reasonable possibility that the sham candidacy affected the outcome of the election, (3) then the district court *should* order new elections. The Seventh Circuit did not state that a district court *must* order new primary and general elections.

Instead, the court specifically relied upon the discretion of the district court in suggesting the district court "should" order new elections. *Id.* The district court in this case properly exercised similar discretion in rejecting Petitioners' request to invalidate the election on I-137.

B. The District Court Properly Exercised Its Discretion in Determining *Not* to Invalidate the Election on I-137.

Petitioners suggest that further conflict results from the Ninth Circuit's decision *not* to reverse the district court for its alleged failure to analyze whether enjoining or invalidating the mining initiative election was a proper remedy. Pet. at 26 n.7; *citing Gjerten v. Board of Election Commissioners for City of Chicago*, 791 F.2d 472, 479 (7th Cir. 1986). Surprisingly, however, in *Gjerten*, the Seventh Circuit reversed an order to hold a special election because the district court had failed to analyze whether the plaintiffs "demonstrated that the unconstitutional practice had a significant impact on the particular election they sought to have invalidated." *Gjerten*, 791 F.2d at 479.

Petitioners argue that the district court in this case similarly failed to analyze whether the alleged unconstitutional restriction on speech in this case had a significant impact on the mining initiative election. Once again Petitioners omit mention of important points raised by the court in *Gjerten*. For example, the court rejected general rules in determining whether drastic relief is required, such as invalidating a state election; instead, "each case must be considered" individually. *Gjerten*, 791

F.2d at 479. As noted by the Seventh Circuit in *Gjerten*, "an appellate court normally will give great deference to the district court's decision as to the precise equitable relief necessary in a particular case." *Id., citing Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir. 1978).

Petitioners' argument flies in the face of the well-established rule that the decision as to the precise equitable relief to award falls to the discretion of the district court. *Lemon v. Kurtzman*, 411 U.S. 192 (1973):

> In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable.

Id. at 200.

In this case, the district court determined that invalidating the election in I-137 was not necessary. The district court determined that invalidating the election in I-137 would not be fair to the Montanans who cast their votes in good faith in support of it. *Cf. Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) (invalidating various regulations on the petition-gathering process in Colorado, but not invalidating any ballot issues passed into law while these invalid regulations were in effect). And finally, the district court determined that invalidating the election in I-137 would not be workable under the circumstances. All of these decisions go to the heart of the discretion afforded to the district court in crafting equitable relief. The Ninth Circuit properly

deferred to the district court in affirming the district court's decision not to invalidate the election on I-137.

CONCLUSION

Petitioners have failed to demonstrate any of the types of serious constitutional violations that warrant the invalidation of the I-137 election. No potential voters were disenfranchised, no improper ballots were cast or counted, and no established election procedures were ignored. Petitioners must rely on the allegation that the Montana election law in effect for part of the campaign on I-137 prevented them from spending as much money as they would have liked in opposition to I-137. Such an allegation fails to rise to the level of a serious constitutional violation that justifies federal court intervention into the otherwise lawful state election on I-137.

For the foregoing reasons, Respondents respectfully request that the Court deny the petition for writ of certorari.

Respectfully submitted,

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June 2001

APPENDIX TABLE OF CONTENTS

Order, Mar. 19, 1999, *Montana Mining Association v. Simonich,* CV 98-48-H-CCL (D. Mont.) .....App. 1

Testimony of Raymond Lazuk: Transcript of Bench Trial Proceedings, Oct. 21, 1998, pp. 21, 28-31, 35-37.....App. 16

Testimony of Jill Andrews: Transcript of Bench Trial Proceedings, Oct. 21, 1998, pp. 56, 64-66, 72, 74-77, 79-81.....App. 26

Testimony of Tamara Johnson: Transcript of Bench Trial Proceedings, Oct. 21, 1998, pp. 115, 121-130.....App. 38

Testimony of Eric Feaver: Transcript of Bench Trial Proceedings, Oct. 13, 1998, pp. 174, 190-192, 198-202.....App. 49

Testimony of Mike Cooney: Transcript of Bench Trial Proceedings, Oct. 20, 1998, pp. 829, 884-885 ....App. 59

App. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

* * *

MONTANA MINING ASSOCIATION, Inc., a non-profit corporation; MAJESTY MINING, INC., a Montana corporation, and YELLOW BAND GOLD, INC., a Montana corporation,

Plaintiffs,

-v-

MARK SIMONICH, in his official capacity as Director of the Montana Department of Environmental Quality; JOSEPH GERBASE, RUSSELL HUDSON, KIM LACEY, DAN DENNEHY, ROGER PERKINS, GARON SMITH, and JOHN DOE, all in their official capacities as Members of the Montana Board of Environmental Review; MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and MONTANA BOARD OF ENVIRONMENTAL REVIEW,

Defendants,

and

CV 98-48-H-CCL

ORDER

(Filed Mar. 19, 1999)

MONTANA ENVIRONMENTAL INFORMATION CENTER; MONTANANS FOR COMMON SENSE MINING LAWS – FOR I-137; and MONTANA COUNCIL OF TROUT UNLIMITED,

Defendant-Intervenors.

* * *

Before the court is Plaintiffs' motion for preliminary injunction. Oral argument was heard on January 22, 1999, and post-argument briefing was completed on February 8, 1999. The court, having heard the arguments of the parties and having considered the briefs, is prepared to rule.

Procedural Background

Plaintiffs filed their original complaint on November 4, 1998. By their complaint, Plaintiffs seek declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202. The focus of Plaintiffs' complaint is November 3, 1998, passage of a Montana ballot initiative, Initiative 137 ("I-137"), which prohibits cyanide leach processing at any new open-pit gold and silver mines or expansions to existing mines. Plaintiffs argue that I-137 is unconstitutional and that its passage violated their constitutional right to procedural and substantive due process. Plaintiffs filed their Fourth Amended Complaint on February 2, 1999.

In a related case, one of the Plaintiffs, Montana Mining Association ("MMA"), had also filed a complaint[1] on September 1, 1998, challenging the constitutionality of Initiative 125 ("I-125"), which had been passed by Montana voters in 1996. MMA complained that I-125 violated its First Amendment right to free speech in the political arena because it prohibited corporate contributions to ballot initiative campaigns. MMA also complained that it was being prevented by I-125 from campaigning against I-137 in the 1998 election cycle. The court consolidated trial on the merits in MMA's I-125 suit with the trial pending in another case[2] challenging the constitutionality of I-125. On October 22, 1998, after hearing closing arguments in the MMA trial challenging I-125, the court ruled from the bench. The court decided that I-125 was unconstitutional and enjoined the State of Montana from enforcing it against the MMA during the I-137 ballot initiative campaign, of which there were eleven days remaining. Based on the testimony presented at trial, the court also found that many factors influence election outcome, particularly the political values, predispositions, and party loyalty of the voters, and that neither money nor media advertising is the sole or even the single most important variable controlling election outcome. Thus, the court decided MMA's constitutional challenge to I-125 approximately seven weeks after MMA filed its complaint.

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[1] *Montana Mining Association, et al. v. Argenbright, et al.*, CV 98-37-H-CCL.

[2] *Montana Chamber of Commerce, et al. v. Argenbright, et al.*, CV 97-6-H-CCL. The October 13, 1998, trial date had been set on April 22, 1998.

Legal Standard for Preliminary Injunction

> "In this circuit, the test for granting a preliminary injunction is whether a party has demonstrated: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation, and the balance of hardships tips sharply in favor of the party seeking relief."

Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996) (*citing Sierra Club v. Marsh*, 816 F.2d 1376, 1382 (9th Cir. 1987)). In addition, when the public interest is involved, the court must examine whether the public interest favors the preliminary injunction applicant. *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (*citing Caribbean Marine Serv. Con. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988)). When the subject of the proposed preliminary injunction is a law enacted for protection of the public interest, the applicant may be held to a higher standard of showing a likelihood of success on the merits of the claim. *See Toy Mfr. of America, Inc. v. Blumenthal*, 806 F. Supp. 336, 340 (D. Conn. 1992), *aff'd* 986 F.2d 615 (2nd Cir. 1993). Because injunctive relief is an equitable remedy, the court may consider an equitable defense such as laches in determining whether to exercise its equitable powers. *Banks v. Bd. of Educ.*, 659 F. Supp. 394, 397-98 (C.D. Ill. 1987).

Discussion

Plaintiffs seek an order enjoining the State of Montana from enforcing I-137, which prohibits new permits for cyanide heap leach processing. Plaintiffs assert that

they have shown serious questions on the merits of their claims because the 1998 election process was fundamentally flawed due to the operation of I-125 (prohibiting corporate contributions to ballot issue election campaigns), and that this fundamental flaw violated Plaintiffs' right to substantive due process. Plaintiffs acknowledge that the court struck down I-125 on October 22, 1998, leaving eleven days to campaign without the prohibitions imposed by I-125, but Plaintiffs claim that this was insufficient time for them to conduct a successful opposition campaign.

Plaintiffs analogize their circumstances to those of the plaintiffs in *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) (state election procedures for vote counting did not violate substantive due process), *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. denied*, 459 U.S. 1012 (1982) (state's refusal to hold special election deprived voters of constitutional right to fill judgeship vacancy), and *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) (state's retroactive invalidation of absentee and shut-in ballots for primary election violated due process).

Those cases discuss a federal court's power to invalidate a state election when the state's electorate is disenfranchised. Here, Plaintiffs argue that because the Montana electorate was deprived of Plaintiffs' full and complete (albeit hypothetical) opposition campaign, the Montana electorate was completely disenfranchised in the November 1998 election. Plaintiff Yellow Band Gold raises the possibility of irreparable injury by asserting that a delay on its permit application could jeopardize its existence as a business.

Upon being questioned by the court regarding the reason for MMA's delay in waiting to file its I-125 challenge on September 1, 1998, counsel for MMA stated that I-137 was not certified for the ballot until July 16, 1998. After certification, Plaintiffs brought a petition for relief before the Montana Supreme Court and waited approximately one month for that court to decide the petition. One week after that petition was denied, Plaintiffs filed both the instant lawsuit and a similar lawsuit in state district court.

Defendant State of Montana ("Montana") argues that Plaintiffs have not demonstrated a likelihood of success on the merits. Montana also asks the court to balance the equities by considering Plaintiffs' unjustified delay in filing their complaint.

Montana also questions the propriety of the remedy sought by Plaintiffs. Montana points out that the constitutional violation complained of was caused by I-125. This court struck down I-125 eleven days before the I-137 election. Montana argues that the appropriate remedy for the finding that I-125 was invalid was to strike down I-125, not to throw out another law (I-137) merely because it was enacted following a campaign during which I-125 was partially in effect.[3]

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[3] The court notes that the Supreme Court case cited by Plaintiffs in oral argument, *Buckley v. American Constitutional Law Foundation*, 1999 WL 7723 (Jan. 12, 1999), accords with Defendant Montana's argument because it was the offending Colorado statutes regulating the petition process that were struck down as unconstitutional, not the laws enacted during the time period when petition regulations were still in effect.

From Montana's point of view, to throw out I-137 because I-125 was unconstitutional severely penalizes the Montana citizens who voted on I-137 and essentially gives the I-137 election to Plaintiffs as compensation for the I-125 constitutional violation.

Finally, Montana contends that there was no disenfranchisement of Montana voters in the I-137 election. A voter information pamphlet was mailed to the home of every registered voter, explaining the elements of I-137 in a balanced fashion and providing both a proponents' and an opponents' view of the measure. No Montana voter was prevented from voting in the I-137 election. There was no procedural irregularity in the election process itself. Defendant Montana argues that ultimately there is no way for Plaintiffs to prove that the I-125 prohibitions in effect until October 22, 1998, affected the outcome of the I-137 election on November 3, 1998.[4]

For all of these reasons, Defendant Montana argues that Plaintiffs' likelihood of success on the merits of their due process claim is minimal and inadequate to meet the threshold requirement for the issuance of a preliminary injunction. As for the threat of irreparable injury to Plaintiffs Yellow Band Gold and Majesty Mining, Montana's position is that any injury found by the court can be compensated by Defendant Montana under Plaintiffs'

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[4] *Griffin v. Burns*, 570 F.2d at 1079-80, briefly touches on this issue, stating that the outcome test may be applied to determine whether an election was controlled by an invalid process and judicial intervention is warranted, but that mathematical precision is not required.

Fifth Amendment takings claim. Finally, Defendant Montana asserts that the court should consider the equitable defense of laches when determining Plaintiffs' application for preliminary injunction.

Laches

The court has raised *sua sponte* the potential application of the equitable defense of laches to the application for preliminary injunction. The parties have provided supplemental briefing on the point, Plaintiffs arguing that laches is not applicable, and Montana and Defendant-Intervenors arguing that laches is available to them as a complete defense to the application for preliminary injunction.

The relevant facts are as follows. The constitutionally infirm I-125 measure was passed by Montana voters in November, 1996, and it prohibited corporations from contributing to ballot initiative campaigns. On February 18, 1998, this court set down trial in the *Montana Chamber v. Argenbright* case (which challenged I-125) for May 18, 1998. On joint stipulation and motion of the parties to that case, the court vacated the trial date on April 22, and reset the *Montana Chamber* trial for October 13, 1998. But for the parties' request, the case would have been tried and decided in the spring of 1998.

In mid-April, Montana newspapers reported that a proposed ballot initiative to prohibit cyanide heap leach open-pit mining had been submitted to the State of Montana for review. On May 18, 1998, the Montana Secretary of State approved the form of that initiative, a fact which was reported by the Montana press. The I-137 proponents

began circulating signature petitions the next day. On May 24, 1998, the Montana press also reported the issuance of an opinion by the Commissioner of Political Practices in response to a query from the Seven-Up Pete Joint Venture (developers of a proposed open-pit gold mine) regarding the application of I-125 campaign prohibitions to it vis-a-vis the I-137 opposition campaign. On July 16, 1998, the Montana Secretary of State certified that the requisite number of signatures had been gathered to place I-137 on the ballot in the November 3 election. On November 3, 1998, a majority of the Montana electorate voted in favor if I-137.

Plaintiffs claim that they did not believe that the requisite number of signatures would be gathered until July 16, 1998, and that furthermore they would not have had standing to challenge I-125 until I-137 was certified on July 16.

Defendant-Intervenors argue that Plaintiff MMA was not diligent in filing its challenge against I-125. The MMA lawsuit was not filed until eight weeks before the election. Despite this late challenge, the court did try MMA's case, and the court found I-125 unconstitutional with almost two weeks of the I-137 campaign remaining. Defendant-Intervenors assert that they need only show that Plaintiffs' delay was unreasonable and resulted in prejudice to the Defendant. *Knox v. Milwaukee Bd. of Elections Comm'rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984).

Laches can be used to bar a plaintiff's claim entirely, *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990), or simply to deny temporary injunctive relief, *Banks v. Bd. of Educ.*, 659 F. Supp. 394 (C.D. Ill, 1987). Once lack of diligence is

established, it becomes plaintiff's burden to justify the delay. *PAC for Middle America v. State Bd. of Educ.*, 1995 WL 571887, *3 (N.D. Ill. Sept. 22, 1995). When plaintiffs do not assert a timely preelection challenge, "they will be barred from the equitable relief of overturning the results of the election." *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988). This is so because the voiding of a state election is considered to be a "drastic if not staggering" remedy. *Id.* at 1180 (quoting *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir. 1967)).

In summary, Defendant-Intervenors conclude that the length of Plaintiff MMA's delay is serious, that Plaintiffs have advanced no reasonable excuse for the delay, and that the delay has had the prejudicial effect of allowing an entire election to be thrown into question, which is a direct threat to political continuity based on the finality of elections. Here, Defendant-Intervenors argue that the heart of laches "is not, like [a statute of limitations], a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced. . . . " *Holmber v. Armbrecht*, 327 U.S. 392, 396 (1946) (quoting *Galliher v. Caldwell*, 145 U.S. 368, 373 (1892)).

Defendant-Intervenors point out that the offending campaign law was passed in 1996, and that Plaintiff MMA waited until September 1, 1998, to challenge the application of that campaign law to a November, 1998 election. Defendant-Intervenors charge that Plaintiff MMA delayed suit for five months after the I-137 ballot initiative process was underway and had been publicized in the Montana press, leaving virtually no time for this court to determine the issue before the campaign. Defendant-Intervenors challenge Plaintiff MMA's excuse that it

did not believe that the I-137 proponents would be able to gather enough signatures for the ballot as being a weak excuse, given the historical context of the I-137 issue and the publicity attendant to it. Moreover, this excuse offers no justification whatsoever for Plaintiff MMA's six-week delay after certification of I-137 for the ballot.

Defendant Montana also argues that the defense of laches should bar Plaintiffs' request for preliminary injunction as a result of Plaintiffs' unexcused delay. Defendant Montana also cites *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988), a case wherein plaintiffs filed a suit two months after a special initiative election was held. The plaintiffs in *Soules* claimed that the decision to hold the special election involved an Equal Protection Violation, but the district court and the appellate panel agreed that laches barred plaintiffs' claim because they "knew the basis for their alleged equal protection challenge well in advance of the proposed special election and . . . failed to explain adequately their failure to press the claim before the election." *Id.* at 1182.[5] Montana asserts that in this case

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[5] The Ninth Circuit panel in *Soules* notes that there is a line of cases holding that parties challenging state election procedures must bring their complaints before the election, not after, unless there is no opportunity for preelection filing. *Soules*, 849 F.2d at 1180. Failure to file a preelection complaint that allows the problem to be cured before the election justifies the applications of laches as a complete bar to the equitable relief of invalidating the election. *Id.* (citing *Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1008 (9th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979); *United States v. City of Cambridge*, 799 F.2d 137, 141-42 (4th Cir. 1986); *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 188-83 (4th Cir. 1983); *Hart v. King*, 470 F. Supp. 1195, 1198 (D. Haw. 1979)).

Plaintiffs likewise knew the basis for their constitutional claim well in advance of the November, 1998, election, yet failed to press the claim in sufficient time before the election to allow for any remedy other than voiding the election. Montana asserts that Plaintiffs' unexcused delay, given the remedy sought, results in extreme prejudice to Montana's voters and to the state electoral process.

Montana argues that it is not enough merely to file a pre-election complaint, but that the party challenging the election must timely file a pre-election complaint, *i.e.*, leaving sufficient time to cure the problem before the election. Montana cites *Barthelmes v. Morris*, 342 F. Supp. 153 (D. Md. 1972), wherein a district court decided that plaintiffs' request for an injunction against the election of a delegates to the Democratic National Convention was barred by laches because plaintiffs had waited until less than eight weeks before the election to file their lawsuit. *Id.* at 159-61. Montana concludes that had Plaintiffs filed a timely pre-election challenge, the constitutional problems of the I-137 campaign could have been cured prior to the conclusion of that campaign.

Analysis

This court regards a preliminary injunction as a serious matter, "a very far reaching power never to be indulged in except in a case clearly warranting it." *Sierra Club v. Hickel*, 433 F.2d 24, 33 (9th Cir. 1970). In this case, the court must balance the constitutional violation alleged by Plaintiffs and the requested remedy of invalidation of a state election, with the good of the public, the public interest in political continuity and the

integrity of state elections, and concerns of federalism and state sovereignty. *See Soules*, 849 F.2d at 1180 (citations omitted). In addition, the court must weigh the fairness of a request that a state election be invalidated in light of Plaintiffs' delay in filing suit until the matter could not be resolved before the alleged violation was well underway.

Here the court returns to the question it posed during oral argument, *viz.*, why the Plaintiffs did not file their claim earlier. Plaintiffs first response, that they filed their claim with the Montana Supreme Court, is inadequate. Plaintiffs simply do not explain their failure to file earlier. Plaintiffs' argument that they did not believe that sufficient signatures would be gathered to put I-137 on the ballot is not credible given the history of the I-122 clean water campaign in 1996 and the response of I-137 as a follow-up petition – not to mention the publicity garnered by the petition gathering itself. Even accepting Plaintiffs' assertion, which this court cannot do, Plaintiffs failed to explain why they did not file their lawsuit immediately when I-137 was certified for the ballot on July 16, 1998.

The court rejects Plaintiffs argument that they did not have standing to challenge I-125 until I-137 was certified for the ballot in July. Certainly Plaintiffs had standing and the matter was ripe as soon as the form of proposed initiative I-137 was approved by the legislative services division of the State of Montana in May, 1998. *See Michigan State Chamber of Commerce v. Austin*, 788 F.2d 1178, 1183 (6th Cir. 1986) (challenge to campaign finance law ripe before ballot initiative qualified for ballot to afford sufficient time for judicial review); *see also American for*

Medical Rights v. Heller, 2 F. Supp.2d 1307, 1313 (D. Nev. 1998) (plaintiffs have standing before initiative qualifies for ballot because injury imminent during petition gathering phase).

It is plain to the court that Plaintiffs knew of the threat directed at their mining activities when petition gathering began in May, 1998. Plaintiffs knew the election would be held in November, 1998. Plaintiff MMA waited until September 1, 1998, to file their lawsuit. Plaintiffs Yellow Band Gold and Majesty Mining waited until November 4, 1998, to file their lawsuit. The I-137 campaign began no later than July 16, 1998. Waiting until September 1, 1998, to challenge I-125 virtually ensured that any problem could not be cured prior to the I-137 election.

In a Fourth Circuit case, the panel stated that "failure to require pre-election adjudication would 'permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action.' " *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983 (quoting *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973)). In the Ninth Circuit, this has been called "sandbagging." *Soules*, 849 F.2d at 1180.

I do not know whether this occurred here. What I do know, and so find, is that there is insufficient explanation for the delay, and the court must consider this in weighing the equities.

Defendants are unfairly prejudiced by the prospect of having a state election invalidated. Furthermore, the

court is not convinced that Plaintiffs have shown a possibility of irreparable injury or a balance of hardships tipping sharply in their favor such as would justify a preliminary injunction.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' application for preliminary injunction is DENIED.

The Clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 18 day of March, 1999.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, YELLOW BAND GOLD, INC., CONTINENTAL LIME, INC., GOLDEN SUNLIGHT MINES, INC.,

Plaintiffs,

-vs-

ED ARGENBRIGHT, in his official capacity as Montana Commissioner of Political Practices, MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, AND CITIZENS FOR I-125,

Defendant-Intervenors.

Civil Docket No. 98-37-H-CCL

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

Heard in Courtroom No. 551
United States Courthouse
301 South Park
Helena, Montana
October 21 and 22, 1998

BEFORE THE HONORABLE CHARLES C. LOVELL

UNITED STATES DISTRICT JUDGE

* * *

[21] caution in considering whether to interfere with the broad constitutional powers of people to bring initiatives forward on the ballot.

THE COURT: Thank you, Mr. Whyte.

And so the plaintiffs may call their first witness, please.

MR. JOSCELYN: Thank you, Your Honor.

We will call Raymond Lazuk, please.

RAYMOND LAZUK, having been called as a witness on behalf of the plaintiffs, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Please state your full name and spell your last name.

THE WITNESS: Raymond Lazuk. L-A-Z-U-K.

CLERK OF COURT: Thank you.

You may be seated.

DIRECT EXAMINATION

BY MR. JOSCELYN:

Q Mr. Lazuk, will you state your name and place of residence, please.

A Yes. Raymond Lazuk. I live in Manhattan, Montana.

Q What is your occupation, please.

A I'm environmental and public affairs superintendent at

* * *

[28] MR. COCKRELL: Pardon, Your Honor? I'm sorry. I was visiting with counsel.

THE COURT: You don't expect to examine Mr. Joscelyn's witnesses, I take it?

MR. COCKRELL: No. No, Your Honor, I don't.

THE COURT: You have agreed to submit the witnesses on behalf of all plaintiffs; is that correct?

MR. COCKRELL: Yes. That is correct.

THE COURT: Fine.

Then we'll go directly to Mr. Scheier.

CROSS-EXAMINATION

BY MR. SCHEIER:

Q Good afternoon, Mr. Lazuk.

A Good afternoon.

Q When did you first learn about I-137?

A It was earlier this year. I can't recall the exact month.

Q Was it prior to its qualification for the ballot?

A Yes.

Q Could you give us a ball park estimate of when that was?

A Boy, it was sometime in the spring.

Q When you learned about I-137, did you have concerns about the initiative or the proposed initiative?

A Yes.

[29] Q And did you make any effort at that point to get together with other officers or employees of the corporation to discuss those concerns?

A No.

Q You did not?

A No. Not that I recall.

Q Does Golden Sunlight Mines have a newsletter?

A Yes.

Q And you would agree with me that that's an effective way to communicate with the employees of the corporation?

A Yes.

Q Okay.

Did Golden Sunlight utilize that newsletter to convey its concerns about I-137 to its employees?

A I don't think so.

Q Did Golden Sunlight ever send individual letters to its employees conveying concerns about I-137?

A I don't believe so.

Q Now, you are the environmental and public affairs superintendent at Golden Sunlight?

A Yes.

Q As an individual, you're perfectly free to speak out against I-137; aren't you?

A I'm unsure, due to my affiliation as a – with Golden Sunlight as a salaried employee, part of the management [30] level. I'm not – I'm just not sure. I feel personally that I am. But with the connection with Golden Sunlight, I guess I'm just not sure.

Q Didn't you send a letter to the editor to the Independent Record earlier this week that was published speaking out against I-137?

A Yes.

Q So you felt that you could at least do that, even though you're an employee of Golden Sunlight Mines?

A I felt I could send a letter, yes.

Q And Mr. Joscelyn asked you a question about whether or not Golden Sunlight Mines has a PAC. And I think you indicated it does not. And I think you stated that it does not – It has not created a PAC because Golden

Sunlight does not believe it would be able to generate enough funds to make it worthwhile.

Is that a fair characterization of your testimony?

A Yes.

Q Did Golden Sunlight do a study to determine whether it could create a PAC that would generate sufficient funds to make contributions?

A It was a rudimentary study, just mathematics multiplying the number of employees by what we would expect from a donation.

Q So Golden Sunlight has never had a PAC; is that [31] correct?

A Not to my knowledge.

Q As an individual, you can certainly contribute in opposition to I-137; correct? You would agree with that?

A Yes.

Q You understand that Golden Sunlight could utilize its newsletter and communicate with other employees of Golden Sunlight discussing the pros and cons of I-137, and that that would not be a violation of I-135 – I-125?

A I'm not sure if it would or it wouldn't be a violation.

Q You're not aware of the law that permits communications between members of a corporation?

A No.

Q Okay.

MR. SCHEIER: I have no further questions, Your Honor.

THE COURT: Mr. Motl.

CROSS-EXAMINATION

BY MR. MOTL:

Q Mr. Lazuk, I believe you recognized in your article, did you not, that both sides of the I-137 debate have legitimate points?

A Yes.

Q And Mr. Lazuk, you're not saying, are you, that I-137 should not pass simply because of the arguments that you

* * *

[35] Q And you could, could you not, keep track of that expenditure of time?

A Sure.

Q And you could put a value on that expenditure of time?

A Yes.

Q And it is that value on your part that you believe would be prevented by Initiative 125?

A Yes.

Q Now, Mr. Lazuk, couldn't you simply be reimbursed for that expenditure of time by a ballot committee which was acting in opposition to I-137?

A By what type of a committee, please?

Q A ballot committee?

A If it was lawful to do so, yes.

Q And you would accept my representation that David Owen was indeed, on behalf of the Chamber of Commerce, reimbursed by a ballot committee for an in-kind expenditure or contribution that he made on Initiative 121?

A I don't know the facts, but I would take your word for it.

Q Okay.

That's in evidence before this court. So that would be a vehicle for you, would it not, that you could use?

A Yeah. Once again, if it's a lawful way of doing it, sure.

[36] Q So in fact, using that vehicle, you could speak out as a corporation; couldn't you?

A If it's permissible under I-125.

Q Okay.

And, sir, likewise, you can always speak out as a person; can't you?

A I'd like to think so.

Q And the state talked to you in general about the ability of your company to form a political committee; is that correct?

A I didn't participate in anything like that.

Q Okay.

A But your company hasn't formed a political committee yet, though; has it?

A No.

Q But your company is wholly-owned by another corporation; is it not?

A Yes.

Q And that company is Placer Dome?

A Yes.

Q And is that a corporation?

A Yes.

Q And does that corporation have shareholders?

A Yes.

Q And does that corporation have a political committee?

[37] A I don't know.

Q Have you asked that corporation if they have a political committee that can contribute to a ballot campaign in Montana?

A No, I did not.

Q That would be another vehicle for funds to a ballot campaign in Montana; would it not?

A If it was lawful to do so, sure.

Q Now, are you here, Mr. Lazuk, as the official representative of Golden Sunlight on this issue?

A Yes.

Q And you're here as the – what exactly is your office?

A What is my position?

Q Yes.

A Environmental and public affairs superintendent.

Q And who was your predecessor?

A My predecessor?

Q Who held the position before you had it?

A Oh. That was probably Rick Dale.

Q Okay.

Now, Mr. Lazuk, have we discussed this enough so that you and I can agree that I-125 leaves vehicles, political committees, ballot committees, and it leaves a reimbursement mechanism that your corporation and the people in it can feel free to speak out on I-125?

* * *

[56] Q And shortly after the leak occurred, you filed a lawsuit; did you not?

A No.

MR. MOTL: No further questions, Your Honor.

MR. JOSCELYN: Nothing further of this witness, Your Honor.

THE COURT: Mr. Whyte.

MR. WHYTE: Nothing further, Your Honor.

THE COURT: Very well.

You may step down. Thank you.

Next witness, please.

(Witness excused from the witness stand.)

MR. JOSCELYN: Your Honor, we'd call Ms. Jill Andrews.

JILL ANDREWS, having been called as a witness on behalf of the plaintiffs, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Please state your full name and spell your last name.

THE WITNESS: Jill Andrews. A-N-D-R-E-W-S.

CLERK OF COURT: Thank you.

You may be seated.

* * *

[64] A Yes. I would be raising money, I would be hiring a consultant, I'd be doing opposition research. I would be – you know, airing TV, radio commercials, I would be placing print media commercials, I would be putting out bumper stickers and signs. And I would build the best grass-roots coalition money could buy.

Q And I assume you'd also be going to civic clubs and other organizations speaking on behalf of the association?

A Yes.

Q And you'd probably try and get individuals to come out in support of the association – or in support or against I-137, rather?

A If I was permitted to do so, I would talk to other associations with like interests and ask them to support me. But I don't believe I can do that under current law.

MR. COCKRELL: I have no further questions, Your Honor.

THE COURT: Cross-examine, Mr. Scheier.

CROSS-EXAMINATION

BY MR. SCHEIER:

Q Good afternoon, Mrs. Andrews.

A Good afternoon.

Q Has the Montana Mining Association used any of the approximately $10,000 that it has in its PAC fund to contribute to the effort to defeat I-137?

[65] A Yes.

Q Approximately how much?

A I would say approximately $9,000.

Q And to whom was that contributed?

A It has not been contributed. It has been spent to do a poll and to prepare some media, assuming it can be placed.

Q And does the Montana Mining Association have a newsletter?

A Yes, it does.

Q Would you agree that a newsletter is an effective means of communicating with the members of an organization?

A It is not only effective communicating with members of the organization, it's effective to communicating to all our other public – other elected officials.

Q Did the Montana Mining Association ever use or utilize its newsletter to communicate to its members concerns about I-137?

A It has not, because our newsletter list is also sent to the media and to our elected officials, and because of past rulings by the Commissioner of Political Practices, we have decided not to put out any more newsletters during a political campaign season.

Q How many members, again, are there of the MMA?

A About 450.

Q Do you have yearly meetings or semiannual meetings?

[66] A We have an annual meeting in the spring and then we have another meeting at our convention and we have periodic board meetings which are usually quarterly.

Q Okay.

During any of those meetings, has there been discussions regarding I-137?

A Yes, there has been.

Q So you've [sic] aware that the members of the association are perfectly free to discuss that during board meetings or meetings of the association?

A Yes.

Q I-125 does not restrict your rights in that respect?

A It doesn't restrict our rights unless we have driven there in a company car or the company is participating in providing any other kind of support.

Q Well, even if you drive to a meeting in a company car, if the meeting consists only of members of the association and it doesn't go beyond that, then you're permitted to do that under I-125; is that your understanding?

A That's my understanding.

Q Now, did the Montana Mining Association ever send individual letters only to its members concerning I-137?

A No.

Q When did the Montana Mining Association form its PAC, its political committee?

* * *

[72] A And I would like to be able to wage an active campaign, and I don't believe that I can.

Q Okay.

Madame, you mentioned that your organization is concerned because of a decision by the Commissioner of Political Practices, is that correct?

A That's correct.

Q Didn't that decision find that your staff on I-122 had failed to report in-kind paid staff time spent working against I-122?

A That's correct.

Q Couldn't your ballot – Couldn't your PAC which has a thousand dollars in it simply reimburse your organization for any paid staff time spent by its staff working against I-137?

A It could. But a thousand dollars doesn't go very far, and there's a lot of work to be done.

Q I thought you testified there was $10,000 at one time in that PAC?

A That's correct.

Q And that would be equivalent to what your organization spent on I-122?

A That's correct.

Q Okay.

And if your organization wished to do more than what

* * *

[74] A We have a lot of retirees.

Q Okay.

Now, you've listed your 23 producer members?

A Correct.

Q Is Cable Mountain a corporation?

A Yes, it is.

Q Of those 23 producer members, how many are not corporations?

A I have one joint venture that I'm sure of. And I have one small miner that I'm not sure how they are structured, but all the rest would be corporations.

Q Now, madame, your – you recognize that in issues like 137, there can be two sides?

A Yes, I do. And I wish I got to tell mine.

Q And you recognize, madame, that the public could choose one side or the other?

A That's correct.

Q So if the public chooses to pass I-137, you would accept their verdict?

A I don't know that I have any alternative. But I would hope that the public would have the right to hear both sides of that question, and they're not hearing that side now.

Q Okay.

Now, madame, going back to you ability to give your side of the story. If I understood what you testified to,

[75] you're concerned that sending your newsletter to individuals other than members may be prohibited by I-125?

A That's correct.

Q And you're agreeing with the commissioner that you can send you newsletter to your members?

A Correct.

Q And the prohibition would be in the cost of sending that newsletter to additional individuals or organizations other than your members?

A I don't understand your question.

Well, the reason you could not send your newsletter to individuals or organizations other than your members, the reason you couldn't, is because that would be an expenditure prohibited by I-125?

A That's correct.

Q Is that correct?

A Yes.

Q Couldn't that expenditure simply be reimbursed by your political committee?

A I'm assuming it can. But I'm also assuming that the information can't be distributed.

THE COURT: Mr. Motl, we're going to take a recess. About 15 minutes, subject to the call of the court.

(The proceedings in this matter were recessed at 3:42 p.m. and reconvened at 3:59 p.m.)

[76] THE COURT: Be seated, please.

You're still under oath, Ms. Andrews.

You may proceed, Mr. Motl.

MR. MOTL: Your Honor, if I could approach the witness for the purpose of having the witness examine Exhibit 801.

THE COURT: Very well.

Q (BY MR. MOTL) Now, Ms. Andrews, you reviewed your files of the Montana Mining Association sufficiently to know if I-122 was an important issue to the Montana Mining Association?

A Yes, I have.

Q And would you agree that it was an important issue?

A Yes.

Q And if you would please turn in Exhibit 801 to the initiative that – the tab that shows the initiative 122 expenditures. And, madame, if you would go – the pages are numbered, the tab has interfered with it, so you need to go to the Montanans for Common Sense Water Laws Opposing 122. You need to go to that section and you need to go where it says contributions, and then I'll represent they're in alphabetical order.

A Okay. I think I have it.

Q Are you in the Ms now as well? They're in alphabetical order so the Montana Mining Association's contribution is [77] listed –

A Yes.

Q Okay.

Would you please find what the Montana Mining Association reported to the Commissioner of Political Practices.

A If I'm on the right line, I believe it's $10,140.29.

Q And can you see what column that's under? That's under monetary; isn't it?

A Yes.

Q That mining association didn't report any in-kind in 1996; did it?

A I don't believe that it did, because one of the first things I did was amend the report and filed one in January, which would have been January of '97.

Q Reporting in-kind?

A Correct

Q Now –

A And I don't believe that the people in the Montana Mining Association understood the rules and regulations of in-kind expenditure.

Q Okay.

But the Montana Mining Association was part of the I-122 coalition – the coalition against I-122; isn't it?

A As I've told you before, I don't have any specific

* * *

[79] A Correct.

Q And in fact, in this case, Montana Mining Association has formed a PAC or has a PAC that it formed a number of years ago that it's used under the circumstances of I-137 wherein board members and other individuals who are members of Montana Mining Association have given money in opposition to I-137?

A Individuals have given money.

Q And that's what I asked?

A Yes.

Q Yes.

And so in effect, Montana Mining Association is using what it can in the initiative process to oppose I-137 as it wishes to do?

A We would go much farther if we were allowed to do so.

Q You have said that.

And I think it was just established that in 1996, for purposes of opposing I-122, the PAC of Montana Mining Association raised $10,000 to give in opposition; is that correct?

A We didn't have a PAC then.

Q Okay.

Ten thousand dollars was given through membership in opposition to I-122?

A That's what the report says. I have no knowledge that [80] it did or did not occur.

Q Okay.

Based on the report, that's what we see; is that correct?

A That's correct.

Q You've testified today that individuals, whether board members or individuals with corporate membership in Montana Mining Association, gave 10,000 – gave up – raised up to $10,000, 9,000 of which you've spent in opposition to I-137; is that correct?

MR. COCKRELL: Objection. That's a misstatement of the record, Your Honor. She testified that individuals; no corporate individual gave any money.

THE COURT: Sustained.

Q (BY MR. WHYTE) The PAC for Montana Mining Association has $10,000, 9,000 of which it has spend in opposition to I-137; is that correct?

A Correct.

Q So it appears that the initiative process as it exists today, including I-125, works the same for Montana Mining Association pre- and post-I-125; wouldn't you say?

A No, I would not.

Q If Montana Mining Association spent $10,000 on I-122 pre-I-125, and spent $10,000 on I-137 post-I-125, how are the expenditures different and how is the initiative process [81] different for you?

A Well, I don't know where the contributions came for the 1996 contribution. But I will bet that they did not come from individuals.

Q Regardless, even though Montana Mining Association raised the $10,000 in two different fashions, it was still the same amount of money pre-I-125 and post-I-125; is that correct?

A Yes.

Q Thank you.

MR. WHYTE: Nothing further.

THE COURT: Redirect.

MR. COCKRELL: Yes, sir. Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. COCKRELL:

Q Ms. Andrews, I just wanted to clear up a couple of things, because I'm not sure the record's entirely clear.

Mr. Motl, and I'm not sure if Mr. Scheier did, they tossed around the terms ballot committee and separate segregated fund.

If I represent to you those are two different entities, you would agree with that?

A Yes, I would.

Q And is that your understanding that a ballot committee is a political committee?

* * *

[115] collective bargaining agreement?

A That is correct.

Q Thank you.

MR. COCKRELL: I have no further questions, Your Honor.

THE COURT: Any further re-cross?

MR. SCHEIER: No, Your Honor.

MR. MOTL: No, Your Honor.

MR. WHYTE: No, Your Honor.

THE COURT: Very well.

You may step down. Mr. Chorny. Thank you.

THE WITNESS: Thank you, Your Honor.

(Witness excused from the witness stand.)

THE COURT: Next witness, please.

MR. COCKRELL: We call Ms. Tammy Johnson, please, your Honor.

TAMARA J. JOHNSON, having been called as a witness on behalf of the plaintiffs, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Please state your full name and spell your last name.

THE WITNESS: Tamara, T-A-M-A-R-A, middle Initial J., Johnson. J-O-H-N-S-O-N. T-A-M-M-Y.

* * *

[121] you?

A Well, we certainly do. I mean, we have always taken an active role in speaking for ourselves, but speaking for ourselves and by ourselves certainly isn't enough when we're trying to communicate a message from, say, Alzada to Yaak, you know, it's a pretty big state. And as individuals, there are things that you certainly can do, but it is – it's – you know, it's nowhere near enough to try to communicate the message that needs to be got out.

Q Thank you.

I'm sorry. Go ahead, finish your answer.

A I'm done.

Q Okay.

MR. COCKRELL: I have no further questions, Your Honor.

THE COURT: Cross-examine. Mr. Scheier.

MR. SCHEIER: I have no questions, Your Honor.

THE COURT: Mr. Motl.

CROSS-EXAMINATION

BY MR. MOTL:

Q Ms. Johnson, what type of an organization is Communities for a Greater Northwest?

A Communities for a Great Northwest is organized as a 501(c)(3) organization as recognized by the Internal Revenue Service.

[122] Q And how long has Communities for a Great Northwest been in existence?

A It was founded in 1988.

Q Now, has the mission of Communities for a Great Northwest remained the same during that time?

A Yes, it has.

Q And you would agree, would you not, that Initiative 122 was also an initiative that Golden Sunlight was concerned about?

A Yes, it was.

MR. COCKRELL: Objection, Your Honor. That's beyond the scope of her direct testimony.

THE COURT: It is, but rather than have this witness called back as part of Mr. Motl's case, let's take it now.

Q (BY MR. MOTL) And Ms. Johnson, in fact, you served as a full-time staff person on the anti-I-122 campaign; didn't you?

A Yes, sir, I did. The grass-roots field representative.

Q In the course of that activity, you were paid by Golden sunlight Mine?

A I was not an employee of Golden Sunlight. I had entered into an independent consulting contract with Golden Sunlight Mine to perform work on – for Montanans for Common Sense Water Laws.

[123] Q And while that activity was occurring, I take it you were continuing your membership in Communities for a Great Northwest?

A Yes, sir, I was.

Q And you and the person that you're standing in on behalf of is Mr. Vincent?

A Yes.

Q And you and Mr. Vincent are also engaged as partners, along with several other people, in another group called Environomics?

A Environomics, correct.

Q Okay.

And you would agree, would you not, that Communities for a Great Northwest was active and communicated with the public on issues of concern to it from 1988 to the present time?

A Yes.

Q And you would agree, would you not, that there was nothing about the status of Communities for a Great Northwest which exempted it from any ongoing reporting requirements that would apply to organizations who had an obligation to report political activity?

A Repeat that, please.

Q If Communities for a Great Northwest was engaged in activities which were political and needed to be reported to [124] a proper authority, it would have reported those activities?

A Communities for a Great Northwest has – has never been involved in political activities where it has concerned candidates. It is only issues, issue-oriented things that are related to our membership.

Q But the leaders of Communities for a Great Northwest, yourself, Mr. Vincent, are politically sophisticated people?

A Well, one correction. I'm not a leader of Communities for a Great Northwest. I am a member.

And two, as to other people's sophistication, I don't even know if I can answer about my sophistication.

Q You would agree, Ms. Johnson, that you're aware of the fact that activities in a ballot issue need to be reported?

A Yes.

Q And you will agree that as part of the I-122 campaign, you were able to confirm early on in the campaign that in-kind activities needed to be reported?

A Well, I was able to confirm one type of incident. I certainly don't pretend to be an expert on what is an in-kind contribution.

Q Okay.

But you knew that the payment that you received from Golden Sunlight needed to be reported as an in-kind contribution?

A That's correct.

[125] Q Now, if Communities for a Great Northwest were involved in Initiative 122 in 1996, they would have reported that; wouldn't they?

A Yes. Well, I shouldn't say that. I think that everybody was incredibly fuzzy as to what was reportable and what wasn't reportable. Clearly, if they had directly spent money, they would have understood that that was a reportable contribution. Simply the means of – you know, a communication with their members, I don't believe they would have felt an obligation to report.

Q So the activities in 1996 communication with the members, those would have been obligations or activities that the Communities for a Great Northwest wouldn't have felt an obligation to report?

A That's correct. In – I believe. You know, I can't speak for everybody.

Q And if I understood your testimony earlier, those are the same type of activities that you're concerned about the Communities for a Great Northwest engaging in in 1998?

A It's quite – It's quite a different matter, actually, in comparing 1996 to 1998. Because in 1996, it was an organization that, while certainly had to report certain kinds of activities, it was able to play whatever role that they could within the process.

In 1998, they are unable to play any role in the [126] process. So it's vastly different.

Q Are you saying there was a ballot committee formed in 1996 that had money and there isn't a ballot committee formed in 1998 that has money?

A I'm saying the Communities for a Great Northwest is not entitled to participate at the level that it can, should, or would like to in this – in this election year. In fact, even on – In checking on it, we have been told – our organization has been told that we should cautiously view this the same as a candidate campaign for the time being, because of the action that we're here today in this courtroom for. We simply have been shut out of the process.

Q Communities for a Great Northwest, I believe you testified, has individual members?

A Yes, sir, it does.

Q And what is the budget of the Communities for a Great Northwest?

A You know, I don't know that specifically as a member. I am certainly not the treasurer. I don't know.

Q But you would agree that a portion of that membership revenue comes from dues from individual members?

A Yes, sir.

Q And that money goes into the treasury of that 501(c)(3) organization?

A That's correct.

[127] Q And you would not disagree with me if I represented to you that I just examined the commissioner's reports for Initiative 122, and Communities for a Great Northwest doesn't appear anywhere on that as making an in-kind contribution or a cash contribution in opposition to I-122?

A I would agree with that. But I would like to explain why that is. Because there isn't anything reportable doesn't mean that they didn't communicate with their members; doesn't mean that Bruce didn't feel as an executive director of that organization, that he could go on radio talk shows, or that he could call an elected official or that any other members within that organization, whether corporate or individual, whether a small timber mill, or, you know, Susie down at the corner beauty salon, nobody ever questioned their right to be able to participate. And they certainly never viewed it as – as they need to now, which simply says that they cannot. They're incorporated; they received more than 5 percent of their income from for-profit corporations; and therefore, as we read 125, are unable to participate.

Q And that means now under your understanding that Bruce cannot communicate with the members within his organization?

A I think that that's dicey. I mean, some of the things that happened out of the complaints with 122, there were many organizations that were taken to task for having not [128] reported their newsletters as an in-kind contribution. If the law says a corporation cannot make an in-kind contribution, cannot make an expenditure of any kind, then quite clearly, just the simple matter of reporting that you've made an in-kind contribution doesn't make it right. That's still illegal.

Q And it's your understanding that the commissioner's decision on newsletters meant that you couldn't send your newsletter to your members anymore then?

A I know that there seemed to be some subtleties there but they're subtleties that are difficult to understand. You know, do you have to specifically have paid for a membership to be a member? What about other organizations that you have reciprocal arrangements with? You send me your newsletter without my having to write a check to you for dues, I'll send you mine without having to write a check for dues. We have those kind of organizations all over the United States on our mailing list. Can we do that or not?

Quite honestly, we're not sure, and we're choosing to be safe than sorry.

Q Ms. Johnson, you put together a group called CURE; did you not?

A I – I was involved in that, yes.

Q Wouldn't it be fair to say you were considered a leader of CURE?

[129] A Yes, sir.

Q And isn't it also fair to say that CURE received a substantial portion of its funds from Golden Sunlight?

A At various periods of time, yes. Sometimes it received and sometimes there was other entities but it received money from Sunlight.

Q And you were responsible for determining the nuances of accounting for and properly dealing with the money that CURE received and the activities of CURE?

A No. I was not responsible for the accounting of the money of CURE at all. That was an elected treasurer

who handled that, and there was a board of directors who – who makes a lot of those decisions.

Q CURE was a nonprofit organization?

A Yeah. I guess.

Q And, madame, you were a leader of that nonprofit; weren't you?

A Yes.

Q And you played in a political arena?

A Yes.

MR. MOTL: I am almost finished, Your Honor. I know it's getting late.

Q (BY MR. MOTL) You appeared as a party in lawsuits?

A Yes.

Q You organized rallies?

[130] A Yes.

MR. MOTL: No further questions, Your Honor.

THE COURT: Mr. Whyte.

MR. WHYTE: I have no questions.

THE COURT: Anything further?

MR. COCKRELL: Only a couple, Your Honor.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA CHAMBER OF COMMERCE, SLETTEN CONSTRUCTION COMPANY, LEHRKIND'S, INC., KALISPELL AREA CHAMBER OF COMMERCE, MONTANA HOSPITAL ASSOCIATION, MONTANA FARM BUREAU FEDERATION, MONTANA EDUCATION ASSOCIATION,

Plaintiffs,

-vs-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

Civil Docket
No. 97-6-H-CCL

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

Heard in Courtroom No. 551
United States Courthouse
301 South Park
Helena, Montana
October 13, 1998
9:30 a.m.

BEFORE THE HONORABLE CHARLES C. LOVELL
UNITED STATES DISTRICT JUDGE
Volume 1 of 6

* * *

[174] (Witness excused from the witness stand.)

MR. KALECZYC: Mr. Eric Feaver.

Your Honor, I believe you had indicated that after Mr. Owen had testified, that other potential witnesses could come back into the courtroom.

THE COURT: Yes.

CLERK OF COURT: Come forward and be sworn, please.

Please state your name and spell it.

THE WITNESS: Eric Feaver. E-R-I-C. F-E-A-V-E-R.

CLERK OF COURT: Thank you.

You may be seated.

DIRECT EXAMINATION

BY MR. KALECZYC:

Q Good afternoon, Mr. Feaver.

A Good afternoon.

Q Mr. Feaver, by whom are you employed?

A The Montana Education Association.

Q And what is your position with the MEA?

A President.

Q And how long have you had that position?

A Since 1984.

Q In 1996 and in prior election years, has the MEA made contributions, expenditures in connection with ballot

* * *

[190] Q Now, did you support the six mill levy in 1988?

A Yes, we did.

Q Do you recall how much money you may have contributed from the MEA in support of the six mill levy?

A No, I do not.

Q Have you made a contribution to the six mill levy campaign in 1998?

A Yes, we have.

Q And do you know how much money was contributed?

A We've contributed 5,000 to the six mill levy and an in-kind contribution of a question on a poll regarding voter respondent attitudes toward the six mill levy.

Q When was that $5,000 contribution made, before or after you disincorporated?

A Before we disincorporated.

Q And from what source did that money come?

A Our ballot issue fund.

Q Do you know how much money is left in your ballot issue fund today?

A As of this very moment, $1,000.

Q The in-kind contribution of the question for the poll, do you know the value of that?

A No, I do not know the value of that. It was one question at the end of a very long poll that dealt with CI-75. We do not know what that value would be.

[191] Q So that one dealt with CI-75 not Initiative 113?

A No. One thirteen, the question was do you – Basically, are you going to vote for or against 113? But that question was a tag-on to the end of a far larger, more comprehensive poll around Constitutional Initiative 75.

Q I see.

And from what source will that poll be paid, from dues or some other source?

A That poll was purchased from member dues dollars.

Q And when was that poll conducted in relation to disincorporation?

A After we had disincorporated.

Q Let's talk a little bit about CI-75.

You mentioned that, Mr. Feaver, a couple times in your testimony now.

I take it that the MEA is actively involved in opposing CI-75?

A Yes, we are.

Q And what's the reason for that, sir?

A Our active involvement is that we believe CI-75 significantly challenges our constitution, our representative form of government, local control of public schools, funding of our pension security, the equity of school funding per pupil; that we think CI-75 is a false promise that will not turn Montana into Colorado.

[192] Q How much money, if any, have you contributed to date to the opposition campaign on CI-75?

A To date as I stand before you, we've contributed about $40,000.

Q And when were those contributions made in relation to your date of disincorporation?

A All were made after our unincorporated circumstance.

Q And what was the source of that $40,000?

A Two sources. First, we purchased the poll as MEA and we made the poll results as a – we gave them to Montanans Against CI-75, an organization which we created. Then approximately $27,000 we have paid directly to the Montanans Against VI-75 came from our ballot issue fund. All future expenditures will be from our member dues dollars.

Q From the period when CI-75 was proposed until it qualified for the ballot, was the MEA actively involved in the initiative question at that time?

A Yes, we were.

Q What was the nature of your involvement?

A First, we encouraged folks not to sign.

Q When you say "folks"?

A Our membership.

Q Was there anything else that you did during that time period?

A We promised that if they qualified for the ballot, we

* * *

[198] previously-incorporated organization, you don't have unlimited money then to spend on these ballot issues; do you?

A No, we do not.

MR. KALECZYC: No other questions at this time, Your Honor.

THE COURT: Cross-examine.

Mr. Motl.

MR. MOTL: May it please the court, Your Honor.

CROSS-EXAMINATION

BY MR. MOTL:

Q Mr. Feaver, your primary fear about I-125 was that it would cause retaliation; is that correct?

A Retaliation in what respect?

Q In the form of items like House Bill 575?

A Certainly, 125 did clearly precipitate House Bill 575.

Q But that was your primary concern about I-125?

A No, I don't think that's my primary concern. It certainly is a concern. I don't know if it's the first one of two or three, but it is a concern.

Q And the reason you had that concern is your belief that the corporations, the for-profit corporations, would seek another venue, another way to work to restrict voices of the not-for-profits like they did with House Bill 575?

A Yes. I believe that there could be some retaliation [199] for unincorporated entities.

Q Okay.

And is it partially because of that fear of retaliation that you've chosen to react as strongly as an organization to I-125 as you have?

A No. I think my testimony is pretty clear on this. We've chosen to go the direction – We have unincorporated so that we can continue to be a viable entity in defense and promotion of our members' interests, and ballot issues are our members' interest.

Q But it is true, Mr. Feaver, is it not, that that fight – that business activity that you described is less than 5 percent of your total income?

A Yes. But they aren't, if you will – one doesn't relate to the other in the law. The – And as you know, no attorney at law nor legal counsel advised us that we were exempt. And we did try to seek that information, and since none was forthcoming, we concluded it was too great a risk to presume that we were exempt, and so we unincorporated.

Q And likewise, Mr. Feaver, the membership services, the travel services, and the other provisions of services that you described, those are all items that either – and the selling of space on the floor of your annual convention, those are all services that are associated in some way with your members; aren't they?

[200] A Yes.

Q You're not in the business, you're not a travel agency?

A MEA is not, no.

Q Okay.

And you were aware, were you not, that in the original motions for summary judgment in this case, the documents were filed by the intervenor and by others which in response to your affidavit said that I-125 did not apply to your organization?

A No, I'm not aware of that.

Q Your counsel did not inform you of that?

A No. I know not of what you speak.

Q Now, I think what I heard you saying is that I-125 does not have an effect on how your organization is acting in the 1998 elections?

A Not anymore.

Q Okay.

And I think I also heard you testify that the special ballot fund, political action committee, that you set up was the source of funding for the two $5,000 contributions that you made to ballot committees in 1996?

A Yes, it was.

Q And it was also the source of $17,000 in funding that you made in 1998?

A To this point, that would be in error. We've made [201] $27,000 contribution from that fund, and that fund now is virtually non-existent. And in addition, we spent $10,000 of member dues dollars purchasing a poll to give us the wherewithal to talk about CI-75 with some intelligence.

Q Okay.

Now, would you agree, Mr. Feaver, that the past ballot activity of the Montana Education Association with the exception of 66 and 67 and its counterpart in the '98 election has been in the area of $10,000 or less?

A No. We spent over $30,000 in 1986 in opposition to Initiative 105. And I don't know, I think five or 10,000

in opposition CI-27. And so we have contributed significant dollars on look-alike ballot issues. It's like 105, 66, 67, 75.

Q But in 1998, your contributions would have ranged from about $92,000 to $1,100?

A Nineteen ninety-eight?

Q Yes.

A Our contributions to what?

Q To Ballot Initiative 18, 20, and referendum 106?

A I'm sorry. I don't follow you.

Q Okay.

A In 1998, we're contributing to –

Q Nineteen eighty-eight?

A In 1988? Perhaps you're correct there, sir.

[202] Q Okay.

And again, in 1990 on CI-55, sixteen hundred dollars, and on 111, $10,000; 1993, '92 none. Ninety-four, CI-25, that would be 4,400; and then, of course, the $70,000 on 66 and 67.

You keep your ballot political committee separate from your legislative political committee?

A Yes, it is.

Q And most unions aren't incorporated; are they?

A To my knowledge, only one union in Montana is still incorporated.

Q And that's not your union?

A No, we're no longer incorporated.

Q Okay.

And most unions when they disincorporate, if they're engaged in federal activity, are following the federal PAC laws?

A I don't think most unions ever incorporate.

Q But if they contribute to a campaign for federal office while under the – following the provisions of federal PAC laws?

A They would.

Q And those would apply to your union as well?

A We are not a federal registered campaign committee. We have no federal PAC activity in Montana.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA CHAMBER OF COMMERCE, SLETTEN CONSTRUCTION COMPANY, LEHRKIND'S, INC., KALISPELL AREA CHAMBER OF COMMERCE, MONTANA HOSPITAL ASSOCIATION, MONTANA FARM BUREAU FEDERATION, MONTANA EDUCATION ASSOCIATION,

Plaintiffs,

-vs-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

Civil Docket
No. 97-6-H-CCL

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

Heard in Courtroom No. 551
United States Courthouse
301 South Park
Helena, Montana
October 20, 1998
9:15 a.m.

BEFORE THE HONORABLE CHARLES C. LOVELL

UNITED STATES DISTRICT JUDGE

Volume 5 of 6

* * *

[829] Your Honor, we could call Secretary of State, Mike Cooney.

MICHAEL RODMAN COONEY, having been called as a witness on behalf of the defendant-intervenor, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Would you please state your full name and spell your last name.

THE WITNESS: My full name is Michael Rodman Cooney. C-O-O-N-E-Y.

CLERK OF COURT: Thank you.

You can be seated.

DIRECT EXAMINATION

BY MR. MOTL:

Q Mr. Cooney, would you please restate your name.

A My name is Mike Cooney.

Q And Mr. Cooney, where do you live?

A I reside at 703 Pyrite Court in Helena, Montana

Q And Mr. Cooney, what position, occupation/position do you presently hold?

A I serve as a Secretary of State for the State of Montana

Q And Mr. Cooney, how long have you served as the Secretary of State?

* * *

[884] will that cause the media to stand up and take – give greater attention to that to report both sides?

Q Yes.

A I don't believe that that's a direct cause.

Q You don't? Well, one last question perhaps, Mr. Cooney. Initiative 125 is now in effect today; correct?

A It is.

Q Would you agree with me that in this election year, we're getting less information pro or con about the seven initiatives that we're going to be asked to vote on in two weeks?

A I would say that there are people who are using this dispute that is being currently resolved as a way – They're using this election in an effort to make a statement about I-125 and this trial is what I think.

Q So you think that on the cyanide initiative, for example, where, according to a newspaper report today, the proponents have raised and spent substantially more money than the opponents, that the opponents aren't raising that money just because they want to somehow present a record for this trial?

A I think they're trying to influence this trial. Because as I stated earlier, people who are members of

corporations or who are involved with those corporations who [885] perhaps want to oppose that particular initiative, I believe could on their own contribute to the campaign to oppose that initiative if they so chose to do so.

I have not seen that article, and I can't tell you what the amounts of money are, but I suspect that if they wanted to, this would not be a problem for them.

Q What is the basis of your assumption?

A It's based – Because I base –

Q Just what you believe?

A Not just what I believe, but I've been involved in the fund-raising side of campaigns, and typically, I know that when people want to contribute, they can contribute. And these people who are part of these corporations, there's nothing stopping them if they would decide to do that, so I think it's an effort on their part not to do it.

Q And that would include the hourly employees of corporations that might be affected?

A If they wanted to form a political action committee to do this, they could participate.

Q You think an hourly employee making seven, ten, whatever dollars an hour, that that person ought to be digging into his or her own pocket in order –

A I know a lot of people who are hourly employees, in fact most of – I would say contributors to many of my campaigns are those type of people who dig in their pockets

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